

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

SALVATORE LaMAGNA,

Plaintiff,

-against-

9:09-CV-1455

**WARDEN BROWN, Superintendent of
Eastern Correctional Facility,**

Defendant.

DECISION & ORDER

McAvoy, S.U.S.D.J.:

This action, brought pursuant to 42 U.S.C. § 1983, was referred by this Court to the Honorable George H. Lowe, United States Magistrate Judge, for a Report and Recommendation pursuant to 28 U.S.C. § 636(b) and Local Rule 72.3(c).

In the Report-Recommendation, Magistrate Judge Lowe recommends dismissal of the Complaint against Superintendent Brown on the ground that there are insufficient allegations of personal involvement by him. Magistrate Judge Lowe further recommended that Plaintiff be granted leave to file an amended complaint. No objections to the Report-Recommendation dated November 19, 2010 have been filed.¹ After examining the record, this Court has determined that the Report-Recommendation is not subject to attack for plain error or manifest injustice. Accordingly, this Court adopts the Report-Recommendation for the reasons stated therein.

On December 23, 2010, Plaintiff executed an Amended Complaint that was

¹ Although Plaintiff did not file objections, he did file an Amended Complaint. See discussion *infra*.

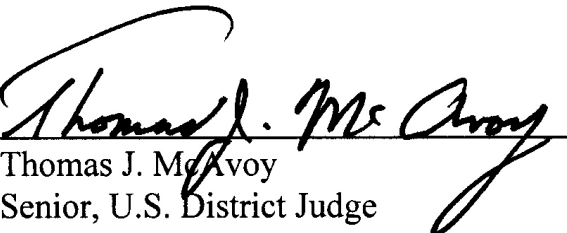
docketed on December 27, 2010. The Court now reviews the Amended Complaint *sua sponte* to determine whether it addresses the deficiencies in the original Complaint (*i.e.*, the lack of facts suggesting personal involvement by Defendant). 28 U.S.C. § 1915(e)(2).

The Amended Complaint alleges that “the Superintendent is charged under the Correction Law and by virtue of court mandate to keep me under his custody free from sexual assaults by inmates . . . and he violated that by deliberate indifference.” The Amended Complaint continues to assert that certain gates were “negligently left open and that is how inmate Miller obtained access” to assault Plaintiff. These allegations comprise legal conclusions and factual assertions unrelated to the named Defendant. The Amended Complaint does not allege sufficient facts to plausibly state a claim against Superintendent Brown. Accordingly, the Amended Complaint must be DISMISSED.

For the foregoing reasons, Defendant’s motion to dismiss the original Complaint (Dkt. No. 17) is GRANTED; Plaintiff is granted leave to file an Amended Complaint, which he has already done (Dkt. No. 25); and, upon review of the Amended Complaint pursuant to 28 U.S.C. § 1915(e)(2), the Court finds that the Amended Complaint fails to state a claim against Defendant. Because Plaintiff has already been afforded an opportunity to assert facts supporting a claim against Defendant, the Amended Complaint is DISMISSED WITH PREJUDICE. The Clerk of the Court shall close the file in this matter.

IT IS SO ORDERED.

Dated: January 5, 2011


Thomas J. McAvoy
Senior, U.S. District Judge

